142

(2)

Supreme Court, U.S.
FILED
OCT 8 - 2009
OFFICE OF THE CLERK

No. 08-1507

In the Supreme Court of the United States

TERRY L. MEIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

MARK B. STERN
DANA J. MARTIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

Petitioner brought suit under the Federal Tort Claims Act for injuries allegedly resulting from his negligent treatment at a Veterans Administration outpatient clinic. The questions presented are:

1. Whether petitioner may avoid principles of *respondeat superior* liability by premising suit against the United States not on the alleged negligence of a federal employee but on California case law requiring an employer to ensure the competence of its work force.

2. Whether the court of appeals erred in its application of California law to claims for failure to establish adequate policies for emergency medical services; for failure to provide medical records to a patient; and for failure to disclose to a patient potential secondary risks of a recommended medical procedure that did not materialize.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 5
Conclusion 12

TABLE OF AUTHORITIES

Cases:

Adams v. *United States*, 420 F.3d 1049 (9th Cir. 2005) 8, 9
Baxter v. *Alexian Bros. Hosp.*, 214 Cal. App. 3d 722 (Ct. App. 1989) 10
Branch v. *Homefed Bank*, 6 Cal. App. 4th 793 (Ct. App. 1992) 11
Daniels v. *Liberty Mut. Ins. Co.*, 484 F.3d 884 (7th Cir. 2007) 8
Elam v. *College Park Hosp.*, 132 Cal. App. 3d 332 (Ct. App. 1982) 6, 7
Johnson v. *Sawyer*, 47 F.3d 716 (5th Cir. 1995) 7
Laird v. *Nelms*, 406 U.S. 797 (1972) 7
Logue v. *United States*, 412 U.S. 521 (1973) 7
Rayonier Inc. v. *United States*, 352 U.S. 315 (1957) 8
Scripps Clinic v. *Superior Court*, 108 Cal. App. 4th 917 (Ct. App. 2003) 11

Statutes and rule: Page

Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563:

§ 2, 102 Stat. 4563 8

§ 2(a)(2), 102 Stat. 4563 6

Federal Tort Claims Act:

28 U.S.C. 1346(b) 1

28 U.S.C. 1346(b)(1) 2, 6

28 U.S.C. 2671 8

28 U.S.C. 2671 note 6, 8

28 U.S.C. 2671-2680 1

28 U.S.C. 2674 2

28 U.S.C. 2679 8

Cal. Bus. & Prof. Code (West 2003):

§ 2262 11

§ 2266 11

§ 2282 11

Cal. Health & Safety Code (West 2006):

§ 123100 10

§ 123110 11

§ 123120 11

Sup. Ct. R. 10 10

Miscellaneous:

Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary, 76th Cong., 3d Sess. (1940) 6

In the Supreme Court of the United States

No. 08-1507

TERRY L. MEIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not published in the *Federal Reporter* but is reprinted in 310 Fed. Appx. 976. The decisions of the district court (Pet. App. 6-29, 30-56) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 2009. On April 20, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including June 3, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, waives the sovereign immunity of

the United States for torts "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1); see 28 U.S.C. 2674 (providing, subject to statutory exceptions, that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances").

2. Petitioner underwent three colonoscopy procedures in 2002 and 2003 at a Veterans Administration (VA) Outpatient Clinic in Martinez, California. Pet. App. 6-7. After the first procedure, the treating physician, Dr. Eddie Cheung, informed petitioner that he had partially removed a lesion that was a tubulovillous adenoma. *Id.* at 7. Dr. Cheung recommended treatment, fearing that the lesion could become cancerous. *Id.* at 34. Dr. Cheung discussed two treatment options: surgery or a second colonoscopy. *Id.* at 7. Dr. Cheung informed petitioner that one risk of a repeat colonoscopy was perforation, which could require surgery to repair. *Id.* at 7, 34. Petitioner chose to undergo a second colonoscopy. *Id.* at 7.

After Dr. Cheung performed the second colonoscopy, petitioner was discharged from the clinic with written instructions to call 911 or go to the nearest hospital if he experienced severe abdominal pain. *Id.* at 8. He was also provided a phone number for the emergency room at Mather Air Force Base. *Ibid.* Petitioner returned home. Pet. App. 7-8. The next morning he had sharp abdominal pains, for which he took pain pills. *Id.* at 8. In the afternoon he called the Oakland VA clinic and left

a message. *Ibid.* He then called the Mather Air Force Base number provided on his discharge instructions and was told to wait for a call back. *Ibid.* After about five hours, petitioner had a friend take him to the emergency room at Highland Hospital. *Id.* at 8, 36. Petitioner underwent emergency surgery to repair a perforation of his cecum and spent ten days in the hospital recovering. *Id.* at 7-8, 36. Petitioner experienced "excruciating pain" both before and after the surgery. *Id.* at 36.

Petitioner had a third colonoscopy to remove additional polyps about six months later. Pet. App. 37. Dr. Cheung performed the procedure and there were no complications. *Ibid.*

3. Petitioner filed a complaint asserting ten claims against the United States under the FTCA, seeking damages for the emotional distress he asserts was caused by the VA's conduct. Counts 1-3 alleged a failure to obtain informed consent before performing the colonoscopies. Pet. App. 8. Count 4 alleged that the VA negligently hired Dr. Cheung, and Count 5 alleged that the VA failed to train and supervise Dr. Cheung. *Id.* at 9. Count 6 asserted that the VA failed to create policies for responding to medical emergencies. *Ibid.* Count 7 contended that the VA failed to provide peer review. *Ibid.* Count 8 asserted a failure to produce medical records. *Ibid.* Count 9 alleged a failure to answer petitioner's questions concerning his care, and Count 10 alleged unauthorized publication of petitioner's medical records. *Ibid.*

The district court awarded summary judgment to the government on Counts 4-10 of petitioner's complaint. Pet. App. 12-21, 27-28. With respect to Counts 4 and 5, alleging negligent hiring and supervision of Dr. Cheung, the court held that a private individual would not be lia-

ble under California law for a hospital's negligent hiring or supervision of medical staff. *Id.* at 13-14. The district court further noted that even if the United States could be held liable for a hospital's negligent hiring or supervision, summary judgment would still be granted because petitioner did not identify any genuine issues of material fact that would support the allegation that the VA breached a duty of care in the hiring or supervision of Dr. Cheung. *Id.* at 14 n.3. The district court also granted summary judgment on Counts 6-9, finding no basis in California law for tort liability based on an alleged failure to provide policies for handling medical emergencies; to provide competent peer review; or to maintain and provide access to medical records. *Id.* at 15-19. The district court held that Count 10, petitioner's tort claim for unauthorized disclosure of his medical records, would be actionable under California law, but granted summary judgment to the United States because petitioner provided no evidence that petitioner's records were disclosed to anyone other than himself. *Id.* at 20-21, 28.

The district court denied summary judgment on Counts 1-3, ruling that petitioner had identified genuine issues of material fact for trial on his informed consent claims. Pet. App. 22-29. After petitioner's submission of his case at trial, the district court granted judgment as a matter of law in favor of the government, finding that the VA did not fail to obtain informed consent. *Id.* at 31-56; see *id.* at 2.

4. The court of appeals affirmed in an unpublished memorandum order. Pet. App. 1-5. The court of appeals upheld the district court's Rule 52 judgment for the government on Counts 1-3. *Id.* at 2. The court of appeals rejected petitioner's contention that his physician had a

duty to disclose not only the potential complications of the colonoscopy that was performed, but also to disclose potential complications of a treatment that might be needed to treat the potential complication. Thus, the court of appeals found no breach of a duty to disclose under California law where Dr. Cheung informed petitioner that there was a risk of perforation during the colonoscopy that might require emergency surgery to repair, but did not disclose potential complications that might arise from that emergency surgery—none of which in fact materialized. *Id.* at 2-3. The court further agreed with the district court that petitioner failed to establish that the VA or Dr. Cheung had a duty to disclose Dr. Cheung's professional medical history. *Id.* at 3.

The court of appeals likewise affirmed the district court's award of summary judgment as to Counts 4-9. Pet. App. 3-4. The court of appeals held that petitioner had failed to establish a basis for any of those claims that would be actionable against a private person in similar circumstances under California law. *Ibid.* Finally, the court of appeals affirmed the grant of summary judgment for the defendant on Count 10, concluding that petitioner had identified no genuine issue of material fact that would substantiate his claim for invasion of privacy under California law. *Id.* at 4-5.

ARGUMENT

The court of appeals correctly held that petitioner had no valid basis to recover under the FTCA. Its decision is unpublished and does not conflict with any decision of this Court or of any other court of appeals. Review by this Court is not warranted.

1. Petitioner complains of injuries related to his treatment at the VA Outpatient Clinic in Martinez, California by Dr. Cheung, his treating physician. Petitioner does not, however, press a claim based on Dr. Cheung's conduct under principles of *respondeat superior*. Instead, he alleges, in his fourth and fifth causes of action, that the VA negligently hired and supervised Dr. Cheung. Petitioner seeks to premise liability on "the doctrine of corporate negligence" recognized in *Elam* v. *College Park Hospital*, 132 Cal. App. 3d 332, 340-341 (Ct. App. 1982), in which a California intermediate court held that a hospital may be held liable in tort for its "failure to insure the competence of its medical staff." Pet. App. 21. On this basis, petitioner argues that the United States may be held liable under the FTCA for the VA's asserted failure to ensure the competence of Dr. Cheung.

As the courts below correctly concluded, the theory of "corporate hospital liability" invoked in *Elam* does not provide a basis for suing the United States under the FTCA. The FTCA makes the United States liable under principles of *respondeat superior* for tort claims based upon the negligent acts or omissions of "employee[s] of the Government."[1] See 28 U.S.C. 1346(b)(1) (providing

---

[1] See, *e.g.*, *Tort Claims Against the United States: Hearings on S. 2690 Before Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 44 (1940) (draft of FTCA was intended to provide a remedy where "the Government as such did not commit the tort, but it was done *through its agent or servant*") (emphasis added); *id.* at 34 (draft bill would recognize claims for injury based on an act by a Government officer or employee that would be considered tortious "if it had been committed *by the agent* of a private individual or a private corporation") (emphasis added); see also Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 2(a)(2), 102 Stat. 4563 (28 U.S.C. 2671 note) (FTCA makes the United States

district courts with exclusive jurisdiction on claims based on "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment"); see also *Laird* v. *Nelms*, 406 U.S. 797, 801 (1972) (the FTCA's legislative history "indicates that Congress intended to permit liability essentially based on the intentionally wrongful or careless conduct of Government employees, for which the Government was to be made liable according to state law *under the doctrine of respondeat superior*") (emphasis added); *Johnson* v. *Sawyer*, 47 F.3d 716, 730 (5th Cir. 1995) (en banc) ("All FTCA liability is *respondeat superior* liability."). As the *Elam* court expressly acknowledged, the theory of direct corporate liability is distinct from the long-established recognition that a hospital, as an employer, may be vicariously liable for the medical malpractice of its employees.[2] See 132 Cal. App. 3d at 337-338.

The United States, of course, may be sued for the alleged negligence of its employees where a private corporation in similar circumstances would be held liable for the negligent acts or omissions of its employees. See, *e.g.*, Federal Employees Liability Report and Tort

---

"responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the responsibility of an employer for torts committed by its employees within the scope of their employment").

[2] The purpose of the *Elam* cause of action is to hold hospitals liable for the conduct of "staff physicians"–that is, physicians who are not employees of the hospital. See 132 Cal. App. 3d at 337, 341. Application of that theory to the United States would accordingly hold the government liable for the conduct of non-employees, running afoul of the FTCA's contractor exclusion, 28 U.S.C. 2671. See *Logue* v. *United States*, 412 U.S. 521 (1973).

Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, § 2(a)(2), 102 Stat. 4563 (28 U.S.C. 2671 note) (FTCA makes the United States "responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the responsibility *of an employer* for torts committed by its employees within the scope of their employment") (emphasis added); see also *Rayonier Inc.* v. *United States*, 352 U.S. 315, 318 (1957) (claim for injuries caused by "negligence of employees [of the United States]" is actionable under the FTCA if the relevant state law "would impose liability on private persons *or corporations* under similar circumstances") (emphasis added). But that is only the case when the similarly-situated private corporation's liability would be grounded in *respondeat superior* principles. Petitioner therefore may not, as the court of appeals recognized, circumvent principles of vicarious liability by asserting an institutional duty to "insure the competence of its medical staff."[3]

---

[3] *Adams* v. *United States*, 420 F.3d 1049 (9th Cir. 2005), cited by the courts below, Pet. App. 3; *id.* at 13, addressed the different but related question of whether a corporate entity can be an "[e]mployee of the government," 28 U.S.C. 2671, under Section 2 of the Westfall Act, 102 Stat. 4563. The Westfall Act provides that the United States may be substituted as defendant in an action against a government employee if the alleged tort was committed within the scope of his employment. 28 U.S.C. 2679. The statutory definition of an "[e]mployee of the government" includes "persons acting on behalf of a federal agency in an official capacity," 28 U.S.C. 2671, and the *Adams* court correctly concluded that "[s]everal contextual features of the FTCA indicate" that Congress meant 'persons' in this provision "to apply only to natural persons" and not corporations. 420 F.3d at 1053; accord *Daniels* v. *Liberty Mut. Ins. Co.*, 484 F.3d 884, 886 (7th Cir. 2007) ("[A] corporation could not be a federal 'employee' on any understanding."). The court noted

Even if petitioner were correct that he could sue the United States under a corporate negligence theory, summary judgment would still have been proper. Further review of the court of appeals' ruling would therefore still be unwarranted. As the district court held, Pet. App. 14 n.3, even assuming the applicability of California's theory of corporate liability under the FTCA, petitioner failed to identify any genuine issues of material fact indicating that the VA breached any state-law corporate duty in hiring or supervising Dr. Cheung. Petitioner contends (Pet. 18) that there is a dispute of material fact about whether Dr. Cheung actually possessed the requisite qualifications for appointment under VA employment criteria (because he had been subjected to disciplinary action by the New York State and California Medical Boards). That fact-dependent assertion does not merit review by this Court. Moreover, the uncontradicted record evidence established that VA personnel verified that Dr. Cheung had a "full and unrestricted license to qualify for a medical doctor position." Clarkston Dec. ¶ 2, No. C 05-04404 Docket entry No. 60 (N.D. Cal. Nov. 17, 2006). The district court noted that the VA was aware of Dr. Cheung's professional history when it hired him, and it correctly concluded that petitioner "pointed to no facts that the VA either did not

---

that the purpose of the Westfall Act was to "protect natural persons whose personal fortunes might suffer, not artificial corporate entities which have limited liability," *Adams*, 420 F.3d at 1054. Because the United States cannot be held vicariously liable under the FTCA for conduct by a supposed "employee" who is ineligible for certification under the Westfall Act, the reasoning in *Adams* supports the determination by the courts below that an FTCA cause of action does not lie in this case premised on the allegedly tortious conduct of the VA as an institution, rather than the acts of its employees.

adhere to its established protocols for background checks when it hired Dr. Cheung or that those protocols were themselves deficient." Pet. App. 14 n.3.

2. Petitioner's remaining issues concern the application of California law to the record evidence. He does not identify any significant issues of federal law, any conflict among the courts of appeals, or any other "compelling reason[]" for this Court's review. Sup. Ct. R. 10.

a. Petitioner contests (Pet. 26-27) the dismissal of his claim against the VA for failure to develop adequate policies related to emergency services, relying on *Baxter* v. *Alexian Bros. Hospital*, 214 Cal. App. 3d 722, 725-727 (Ct. App. 1989). That decision, however, was limited to the narrow issue of whether a California statute, setting forth minimum qualifications for expert witnesses testifying in cases alleging malpractice by an emergency room physician, applies to a suit against a hospital that does not allege negligence by an emergency room physician. The court specifically limited its holding to that statutory construction issue and declined to opine on the merits of the plaintiffs' claim that a hospital failed to provide essential backup services to its emergency room. *Id.* at 726.

b. Petitioner likewise errs in urging (Pet. 28-33) that California law supports a cause of action for emotional distress resulting from the VA's failure to respond to questions and provide him with copies of his medical records. As the courts below recognized, the state statutes relied on by petitioner do not indicate that a private person would be liable in a private tort action for failure to provide the requested information. See Pet. App. 4, 17-19 (citing Cal. Health & Safety Code §§ 123100,

123110, 123120 (West 2006); Cal. Bus. & Prof. Code §§ 2262, 2266, 2282 (West 2003)).[4]

c. The court of appeals also properly affirmed dismissal of petitioner's claims based on failure to obtain informed consent. Pet. App. 2-3; see *id.* at 43-44. Dr. Cheung disclosed to petitioner the serious potential complications of the colonoscopy itself, including perforation of the bowels, bleeding, and death, *id.* at 32-33, and petitioner does not argue to the contrary. The risks identified by petitioner here (Pet. 35) and in the courts below are secondary risks associated with the surgery that would be necessary to repair a perforation at the tumor site (which is not where the perforation occurred in this case). Pet. App. 2-3, 38-39. As the district court correctly concluded, petitioner failed to establish that those secondary risks themselves constituted serious known risks of the *colonoscopy* procedure as to which disclosure was required. *Id.* at 43. Finally, as the courts below also correctly recognized, Dr. Cheung had no duty under California law to inform petitioner of his complete malpractice history, especially when the California Medical Board itself did not require him to disclose that information to patients. *Id.* at 3, 49-53.

---

[4] Neither *Scripps Clinic* v. *Superior Court*, 108 Cal. App. 4th 917 (Ct. App. 2003), nor *Branch* v. *Homefed Bank*, 6 Cal. App. 4th 793 (Ct. App. 1992), relied on by petitioner (Pet. 32), recognized a cause of action for emotional distress based on the cited statutory provisions or involved a claim for alleged failure to turn over medical records or answer questions concerning medical care. See *Scripps Clinic*, 108 Cal. App. 4th at 930-931 (claim of negligent infliction of emotional distress based on a medical group's failure to give adequate notice before transferring a patient to another medical group for treatment); *Branch*, 6 Cal. App. 4th at 799-800 (no emotional distress damages available for claim of negligent misrepresentation in employment contract when only other harm was economic in nature).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General

TONY WEST
Assistant Attorney General

MARK B. STERN
DANA J. MARTIN
Attorneys

OCTOBER 2009